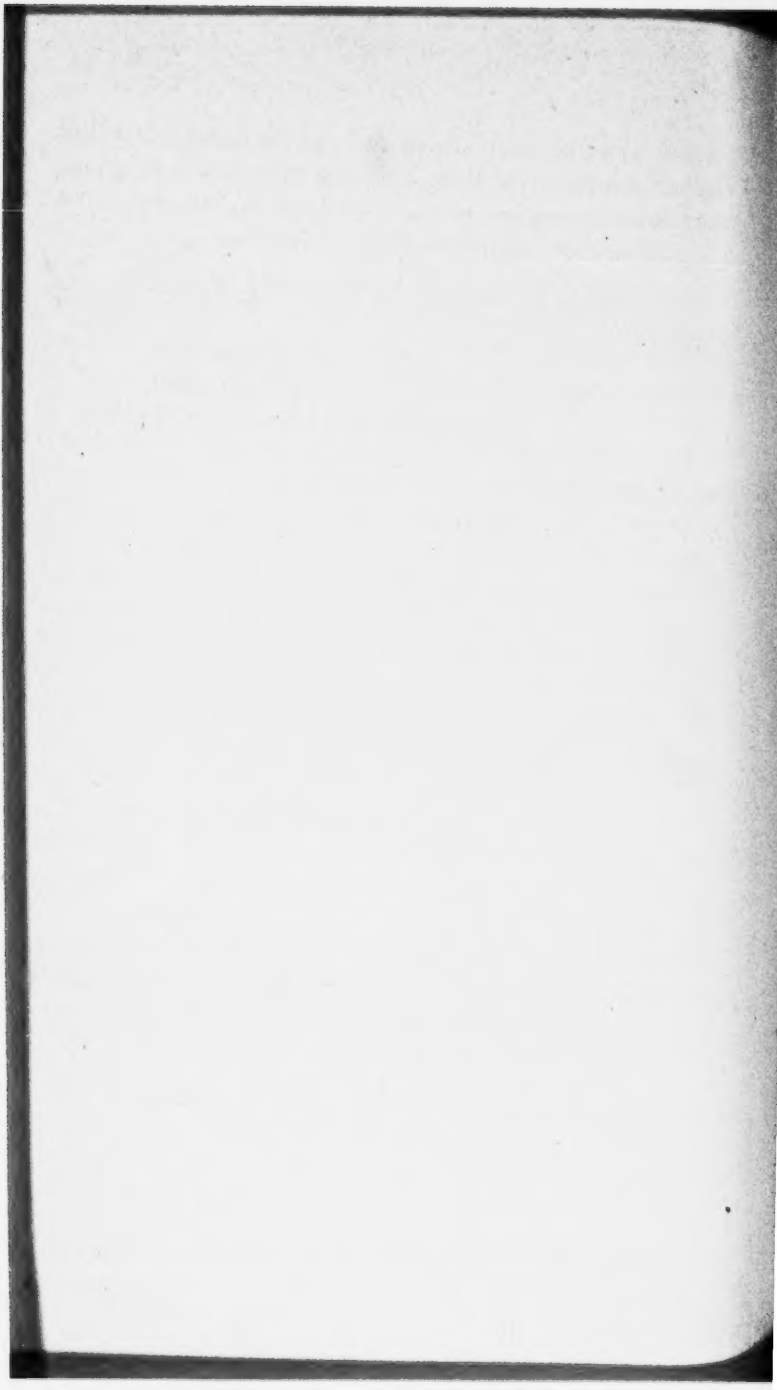

Brief of Chaney for Appellant

Filed January 7, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1898.

MORRIS KEIM

vs. } No. 278.

THE UNITED STATES.

APPELLANT'S STATEMENT AND BRIEF OF ARGUMENT.

JOHN C. CHANEY,
Appellant's Attorney.

December 30, 1898.

JUDD, LAW PRINTER, 416 5 STREET, N. W., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

MORRIS KEIM, *Appellant,*	
vs.	No. 278.
THE UNITED STATES, *Appellee.*	

APPELLANT'S STATEMENT AND BRIEF.

The appellant who is a citizen of the United States, and a temporary resident of the District of Columbia, was on the 26th day of August, 1862, a resident of the State of New York, and, on said date, enlisted in Company I, 154 New York Volunteer Infantry, entering the service for the suppression of the late rebellion in the United States.

He served with said regiment up to the 25th day of January, 1865, when he was duly transferred to the 154th Company of the Second Battalion, Veteran Reserve Corps in which last named company he served up to April 17, 1865, when he was "honorably discharged" at camp in Nashville, Tennessee, by order of Gen. George H. Thomas "by reason of disability from *inguinal hernia* contracted from excessive labor while under military or-

ders at camp of detachment, Chattanooga, Tenn., in the summer of 1864."

May 7, 1888, upon civil service examination, he was duly appointed to a clerkship in the Post Office Department at an annual salary of $900, which position he held and efficiently filled up to February 4, 1889, when he was duly transferred to the Treasury Department and was assigned to duty in what was then known as the Sixth Auditor's Office at the same salary. He performed his duties so well in the last named service that he was, on the 31st of October, 1890, upon examination, duly promoted to a clerkship in class one in said Sixth Auditor's Office at a salary of $1200 per annum, the duties of which he faithfully performed up to March 16, 1893. On the last named date he was duly transferred to the Interior Department and assigned to duty in the Bureau of Pensions in the class in which he rendered service in the Sixth Auditor's Office immediately before his transfer last aforesaid. He discharged the duties in his new position at the salary of $1200 until March 1, 1894, when he was reduced to a clerkship of $1000 per annum, at which last named salary he continued in said service up to July 31, 1894, when he was formally discharged from the said Civil Service, since which time he has not been permitted to perform the duties of his position, although standing ready and willing at all times since the last named date to perform and fulfill his said duties.

At the time appellant was excluded from his duties as such clerk, other clerks as to whom petitioner was equally qualified for the discharge of said duties, and who were not honorably discharged from the military or naval service of the United States, were retained in the Pension Office. Neither were those other clerks, so retained, the widows or orphans of deceased soldiers or sailors.

Appellant's petition alleges that he was efficient and faithful in the discharge of his duties as such clerk, and that he possessed the necessary qualifications for said duties.

Two causes of action were embraced in his petition, namely—

1. A balance of $35.30 on the last month he was borne on the Pension Office rolls as such clerk, and

2. For his salary at the rate of $1,000 per year from the date of his, so-called, discharge from his duties of his clerkship.

To the petition in the Court below the Attorney General filed a demurrer, upon which briefs, *pro* and *con*, were filed, and oral arguments had, and an opinion of the court overruling the demurrer.

Testimony on the allegations in the petition was then taken, briefs prepared thereon and a trial had resulting in an adverse decision, by a divided court, on the case as presented.

The opinions announced by the court are found at pages 7 and 10 of the record in this court.

In the opinions of the Court it will be seen that the merits of the case were not considered by the Court ;—in short, the Court of Claims decided that the action of the Interior Department in discharging appellant as aforesaid was within the discretion of the Secretary of the Interior, and that therefore the Court of Claims could not consider the petition, and thereupon dismissed it. In short, the Court of Claims assumes that appellant is without remedy. Blackstone lays down the law, as

"A general and indisputable rule that where there is a *legal right*, there is also a legal remedy by suit, or action at law, whenever that right is invalid."

See also Marbury *vs.* Madison, 1 Cranch, 163.

The position assumed by the appellant is that the matters embraced in the said petition were not within the discretion of the Secretary of the Interior, but that he must be controlled by the Statutes of the United States in such cases made and provided.

These statutes are as follows:

Revised Statutes, section 1754:

"Persons honorably discharged from the military and naval service by reason of disability resulting from wounds or sickness incurred in the line of duty shall be preferred for appointment to civil offices, provided they are found to possess the business capacity necessary for the proper discharge of the duties of such offices."

Act of August 15, 1876 (Supplement Rev. Stat., Vol. 1, p. 120).

Section 3:

"That whenever, in the judgment of the head of any Department, the duties assigned to a clerk of one class can be as well performed by a clerk of a lower class, or by a female clerk, it shall be lawful for him to diminish the number of clerks of the higher grade and increase the number of the clerks of the lower grade within the limit of the total appropriation for such clerical service:

"*Provided*, That in making any reduction of force in any of the Executive Departments, the head of such Department shall retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States and the widows and orphans of deceased soldiers and sailors."

The Civil Service Act of 1883 (22 Stat., L. 403, Sup. Rev. Stat., Vol. 1, p. 395).

Section 7:

"That after the expiration of six months from the passage of this Act no officer or clerk shall be appointed and no person shall be employed to enter or be promoted in either of the said classes now existing, or that may be arranged hereunder pursuant to said rules, until he has passed an examination, or is shown to be specially exempted from such examination in conformity herewith.

"But nothing herein contained shall be construed to take from those honorably discharged from the military or naval service any preference conferred by the seventeen hundred and fifty-fourth section of the Revised Statutes of the United States, nor to take from the President any authority not inconsistent with this Act conferred by the seventeen hundred and fifty-third section of said Statutes."

Section 1753, R. S.:

"The President is authorized to perscribe such rules and regulations for admission of persons into the Civil Service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge and ability for each branch of service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries, and may prescribe their duties, and establish regulations for the conduct of persons who may receive appointments in the Civil Service."

Sec. 2 of the Civil Service Act provides for "open, competitive examinations for testing the fitness of applicants for the public service."

Section 6 of said act provides for the classification of clerks in accordance with Sections 158 and 163 of the Revised Statutes of the United States.

General Rule 3 of the Civil Service Commission established and approved by the President, prescribes that,

"No person shall be appointed or employed to enter the Civil Service, classified in accordance with section 163

of the Revised Statutes, and under the act to regulate and improve the Civil Service of the United States, approved July 16, 1883, until he shall have passed an examination or shall have been shown to be especially exempted therefrom by said act, or by an exception to this rule set forth in connection with the rules regulating admission to the branch of the service he seeks to enter."

General Rule 8, Civil Service.—

1. That persons who have *prima facie* claim of preference for appointments to civil offices under Section 1754 Revised Statutes, shall be preferred in certifications made under the authority of the Commission to any appointing or nominating officer."

2. In making any reduction of force in any branch of the classified Civil Service, those persons shall be retained who, being equally qualified, have been honorably discharged from the military or naval service of the United States; and also the widows and orphans of deceased soldiers and sailors."

In the disscenting opinion of Judge Peelle of the Court of Claims bench, page 11 of the record, the position of appellant is aptly stated:

"The Claimant's right depends upon the proper construction to be given to section 3, Act of August 15, 1876, in connection with section 1754, preserved by the Civil Service Act."

And this is necessarily true in view of the rules and regulations of the Civil Service Commission, established and promulgated by the President in accordance with the Statutes above quoted.

Argument.

Appellant holds that the Court of Claims erred:

1. In not granting the Claimant's findings set out in

finding 6 of the record below, and which findings appear in this record of appeal, at pages 6 and 7, and numbered respectively, 1, 2, 3, 4, 5, 6, and 7.

2. In dismissing the petition in the lower Court, and in not giving claimant judgment on the two causes of action therein for the full amount claimed.

In short, the Court erred in not acknowledging its jurisdiction of the action, and in dismissing the petition.

The Act of March 3, 1887, section 1 (24 Stat., L. 505, 1 Sup. R. S., 559), endowed the Court of Claims with jurisdiction, as follows:

"The Court of Claims shall have jurisdiction to hear and determine the following matters: All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of any Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable."

This Act undoubtedly confers upon the Court of Claims the jurisdiction to "hear and determine" Appellant's case, because his claim is founded upon the laws of Congress, seconded by rules and regulations of the Executive Departments, authorized and promulgated by the President in accordance with express powers conferred by law on the Chief Executive of the United States.

The purpose of Congress was to secure the honorably discharged Union soldier or sailor a life tenure in the Civil Service if he possessed the necessary business quali-

fications to discharge the duties of a clerkship within the classified service.

And is this purpose not accomplished in making a law "that the head of such department *shall retain* those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States?

If the head of an Executive Department is required by said law to *retain* a clerk who has been honorably discharged from the military service of the United States if he is equally qualified with other clerks, and the head of an Executive Department fails to comply with the law relating thereto is the clerk not endowed with a remedy under the laws of the land? Or has the head of a Department a right to disregard the law? Does Executive discretion override positive *law?*

In the statute to which reference is made, there is an express command to *retain* the clerk who has once been honorably discharged from the military service of the United States. Appellant was such a clerk. "Shall retain" is a very plain and positive verb. There is no dodging it.

Let us take the language used in Section 1754, above quoted, with reference to *appointments* to the Civil Service. The section says:

"Persons honorably discharged from the military * * service by reason of disability resulting from wounds or sickness incurred in the line of duty *shall be preferred* for appointments to civil offices," etc.

Is there any question here of what the Executive officer shall do when a qualified ex-soldier asks for appointment, honorably discharged on account of any disability incurred in the line of duty?

The word *shall* means *must.*

Section 692, Revised Statutes, authorizes appeals to the Supreme Court from all final decrees of any circuit court, in language as follows:

Section 692, R. S.:

"An appeal shall be allowed to the Supreme Court from all final decrees of any Circuit Court," etc., etc. And Chief Justice Waite, in passing on this language, "Shall be allowed," in the case of *Ex-parte* Jordan, 94, U. S. 248, held that "shall be allowed" means "*must* be allowed."

On the 18th of May, 1889, the construction of the language used in said section 1754—"shall be preferred"—was considered by the Assistant Attorney-General for the Post Office Department, who gave it as his opinion that the above verb means "*must* be preferred," and is, therefore, mandatory upon the executive officer.

This opinion was called to the attention of Attorney-General Miller who in reviewing the opinion of his said Assistant, said, at page 318 of 19 Attorney-General's Opinions:

"I have no doubt that it was the intention of Congress to make it the *duty* of those making appointments for civil offices to give preferance, other things being equal, to the class of persons named in this section."

Wayne MacVeagh, Attorney-General of the United States in 1881, was called upon to construe Section 1754 R. S. and at page 195 of 17 Attorney General's Opinions, he said, in construing the same in connection with Section 1753 of the Revised Statutes, that "They do prescribe that of two or more applicants found to be equally qualified by such examination for appointment the preference *shall be given* to any such applicant who has been honorably discharged from the military or naval service

by reason of disability resulting from wounds or sickness incurred in the line of duty."

If "*shall* be preferred" means "*must* be preferred" in section 1754, "shall retain" means "*must* retain" in the Act of August 15, 1876.

If preferance of appointment "*shall be given*" to the honorably discharged Union soldier, in Section 1754, as declared by the Hon. Wayne MacVeagh, above, why is it not also clear "that in making any reduction of force in any of the Executive Departments, the head of such department *shall retain* those persons who may be equally qualified who have been honorably discharged from the military * * * service of the United States?" The answer is irresistible that the Executive head *must retain* the soldier.

In the argument in the Court below, the Attorney General intimated, if he did not assert, that the Act of August 15, 1876, gave to the Executive the right to pass judgment on the dismissal of a clerk. To reach this conclusion, he read into the *provisio* of that act, the words of the first line of the law, that "whenever in the judgment of the head of any department" he "shall retain those persons who may be equally qualified who have been honorably discharged," etc.

This was an abortive attempt upon the virtue of that act for two real good reasons,—

1. It disgraced the rules of grammar, and failed to make a complete sentence.

2. It was a desperate attempt to make the law mean what it does not, and never was intended to mean.

That act invokes the "judgment of the head of any department" upon the question of whether the duties as-

signed to clerks of a higher grade and salary may not be performed by clerks of a lower grade and salary.

And if, in his judgment, the duties so assigned can be as well performed by clerks of the lower grade and salary, then he shall discharge the higher grade clerks and keep the lower grade clerks to perform these duties; *but* and *except* the soldier or sailor, or his widow, or his orphan, these he shall not discharge.

He is expressly commanded to retain these persons. He has no discretion in the matter. He cannot form an opinion upon whether these shall be retained or dismissed. He must keep them if they have by examination proven themselves qualified for the discharge of their duties, and faithfully and efficiently perform the same.

His "judgment" is invoked only on "whether there must be a reduction of the force." The law directs and commands him to retain the soldier or sailor and his widow and his orphan, if he retains anybody.

In pursuance of this argument the next thing to consider is, as to who determines the qualifications of the appointee in the Civil Service. Does the head of an executive department decide this question?

The response to this question is, that the Civil Service Commission is especially endowed with ways and means, and is especially commissioned to determine this question; and that only the persons certified to the executive officer by said commission can be appointed to an office in the classified service. The head of a department cannot, therefore, decide upon the qualifications of appointees.

The purpose of the Civil Service law was to put the appointee beyond the personal preference or caprice of the head of an Executive Department; that a qualified appointee might be secure in his office without let or hindrance of the head of a Department.

Merit, rather than personal preference, in appointees, was the controlling spirit of the Civil Service law. The head of an Executive Department has no discretion in the matter. He must appoint whom the Civil Service Commission say is qualified. He must promote only those who upon meritorious examination show themselves entitled to promotion. The "rules and regulations" control promotions or *de*motions when the appointee has duly entered upon his duties.

The same power which created the Secretary of the Interior, March 3, 1849 (Section 437, R. S. U. S.), created the Civil Service Commission, January 16, 1883, and enacted Section 1754 R. S., March 3, 1865, and passed the Act of August 15, 1876, on 120th page of Supplement to R. S. U. S., Volume 1.

By section 441, R. S. (1878) the Secretary of the Interior is charged with the supervision of public business relating to the following subjects: * * Pensions. * *

By Section 470, R. S. U. S., (1878) there shall be in the Department of the Interior, a Commissioner of Pensions who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to receive a salary, etc., etc.

These officers cannot be greater than their creator. They are subject to the laws passed by the Congress of the United States. They are bound to obey the laws of Congress.

In the celebrated Lee case, 160 U. S. 196, at page 220, this Court held, that "no man in this country is so high that he is above the law." No officer of the law may set that law at defiance with impunity. All officers of the Government, from the highest to the lowest are creatures of the law, and are bound to obey it. It is the only supreme power in our system of Government, and every

man who, by accepting office, participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives."

Nearly all Civil Service laws provide for dismissals as well as appointments in express terms; for, primarily, in this country, all offices emanate from the people, and must be governed by the Constitution and the laws.

The statutes governing this case, when taken together, command three things to be done:

1. Appoint qualified persons.

2. Promote qualified persons.

3. Retain qualified persons, and, in necessary reductions of the force, retain soldiers.

The said statutes and the Civil Service rules supplementing the regulations of the Executive Departments say how the qualifications of persons for appointment, promotion, and retention shall be determined. The controlling test is *merit*. This test is not left to the Executive. It is expressly taken from him and lodged elsewhere.

The clerk's education, method, habits, deportment, etc., are all taken into consideration by the qualification department of the Government.

The Civil Service law and the rules and regulations thereunder were unquestionably designed to substitute the merit system for the personal preference of the Executive officer in all civil places within the classified service.

In the orders, instructions, etc., relating to the efficiency record and examinations for promotions in the Department of the Interior, published in January 1893, this purpose is explicitly expressed.

The President, in pursuance of this purpose, December, 4, 1891, said:

"With a view to placing promotions wholly upon the basis of *merit*, in my opinion, the examination for promotion of those who present themselves should be chiefly, if not wholly, upon their knowledge of the work of the Bureau or Department to which they belong, and the record of efficiency made by them in their previous service. I think the records of efficiency kept from day to day, should be open to the inspection of the clerks."

In accordance with the above, the Secretary of the Interior, December 31, 1892, prepared and promulgated an order, accompanied by examples and explanations which applied to the Pension Office, to secure the end desired by the President's letter.

April 23, 1894, the Hon. Hoke Smith promulgated an order concurring in the order of his predecessor and extending the same so that "promotions shall be based purely upon merit."

These "orders" were in force and effect when Appellant was summarily relieved of his duties.

The statutes above referred to provide for the admission into, and retention in the classified service, of qualified persons, and the Civil Service Act and the rules and regulations promulgated in accordance therewith prescribe by whom and in what manner these qualifications are determined. They do not depend on the personal preference and caprice of the head of a Department.

It is true that dismissals are not *expressly* provided for, but the merit system which is expressly established does include dismissals of course. The reasons set forth for appointments and promotions and the means provided for the accomplishment of appointments and promotions must inevitably include the purpose to secure the service

against inefficiency, by dropping incompetents through the same means by which appointments and promotions are secured.

The power to appoint includes the power to dismiss. The same authority to examine for appointment and promotion must be the test for dismissal, otherwise the merit system would fail; for if the Executive may dismiss at his own volition he could put out those whom he disliked as fast as the qualification department certified the appointees in, until he secured those to his liking. Radical changes in the Civil Service could thus come with each new administration, or at any time and confusion would prevail in the classified service.

Without regard to these statutes and in instances where no restrictions surrounded the Executive, he might *remove* as well as appoint at pleasure.

In the case of Hennen, *exparte*, 13 Pet., star page 256, it was held that "no tenure of office being subscribed by the Constitution or laws of the United States, it (Hennen's office) it is held at the will of the appointing power," and that Hennen was properly discharged. If, however, a tenure of office had been fixed, as is fixed by the laws referred to as applicable to this case, Hennen would not have held his office at the will of the appointing power, and could not have been summarily removed.

The Executive appoints the person who is found, by another head, to be qualified. He must retain the qualified soldier, whose qualifications are determined by the department charged with its determination.

The Executive may do three things:

1. Appoint whom the qualification department finds qualified.

2. Promote whom the qualification department finds qualified.

3. Discharge whom the qualification department finds disqualified.

He possesses no discretion.

The merit system prevails, and where the merit system prevails there can be no discretion.

The clerk under a merit system is entitled to the benefit of the laws, rules and regulations by which it is secured.

In the case of United States against Perkins, 116 U. S., 483–485, it was decided, that " when Congress by law vests the appointment of inferior officers in the heads of Departments, it may limit and restrict the power of removal as it deems best for the public interests."

This was the case of a naval cadet engineer who was not found deficient on examination ; not dismissed for misconduct under the provisions of Revised Statutes, section 1525 ; or upon and in pursuance of a sentence of court-martial ; but *was* honorably discharged *against his will.*

This Court held that he could not be thus dismissed from the service, because it was beyond the power of the Secretary of the Navy to discharge him ; that it was in violation of law. And in said suit for salary for the time dating from his so-called discharge he was authorized to recover.

It was insisted in that case that to restrict the Secretary's power, of removal infringed the Constitutional prerogative of the Executive, and was therefore void.

But it was held that Congress having the Constitutional authority to vest the appointment in the Secretary of Navy implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed. This case goes further :

"The head of a Department has no Constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments but in all that is incident thereto."

The Civil Service law through which the merit system was established is held not to infringe the Constitutional prerogative of the Executive, as shown in the decision of this Court in *Ex parte* Curtis, 106 U. S., 371–379.

This legislation must be construed in *pari materia*. The key to the correct conclusion is found in keeping in mind the *object* to be accompliished by the legislation.

The ultimate object was efficient service.

The direct object,—qualified persons, with preference for honorably discharged soldiers or sailors who had incurred wounds or disease in the line of duty,—*a life tenure for these persons.*

The relation of these statutes, the one to the others, makes it reasonably clear that the "object" has been attained.

"The correct rule of interpretation is, that, if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law that all acts, in *pari materia*, are to be taken together as if they were one law."

United States *vs.* Freeman, 3 How., 557;
" " *vs.* Kirby, 7 Wall., 482;
Bernier *vs.* Bernier, 147 U. S., 242.

When, therefore, an honorably discharged Union soldier proves himself qualified for a clerkship, through the established means of ascertaining this fact, and has been duly appointed to a clerkship in the classified service of the government, he "shall be retained" therein.

The soldier has a vested right in his office secured and held as appellant secured and holds his.

"The government of the United States has been emphatically termed a government of *laws*, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right." Madison—Marbury case, 1 Cranch, 137, at page 163.

In the case of Lytle *vs.* Arkansas, 9 Howard, 332–333, it was declared that "where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him."

Appellant having been duly appointed to a position in the classified service, as Judge Peelle well says:

"The presumption is that he possessed the business capacity necessary for the proper discharge of the service into which he entered, and he was therefore entitled to retention in the reduction of force; but aside from such presumption, the findings set out and refused to be found because deemed irrelevant, clearly establishes the claimant's efficiency as a clerk, and that being so, he must have been 'equally qualified' as matter of fact with those so retained. Such being his status at the time of his discharge, he was entitled, under the Act of 1876, *to be retained.*"

We are dealing with a positive statute, which commands the Executive Department to retain the soldier in the service, when he has complied with other statutory requirements governing his qualifications.

We are in no way interferring with Executive discretion, or the just and necessary management of the Executive duties.

We are simply fighting for the rights conferred by the solemn laws upon the soldier who made it possible for this Government to exist.

Appellant has been deprived of his office by an arbitrary Executive officer in opposition to this positive law, which has resulted in depriving him of the salary of said office which was his vested legal right.

The Causes of Action.

1. Appellant was borne on the Pension Office Rolls up to July 31, 1894, at the annual salary of $1,000.

This entitled him to have and receive of the United States for the month of July, 1894, $84.20. He in fact only received $48.90 for his services for that month. There is therefore due him, as a balance for that month, $35.30.

He is certainly entitled to this sum, for he actually earned it.

In Sleigh's case, 9 C. Cls., 369, it was held—

"That the incumbent of an office is *prima facie* entitled to the lawful compensation thereof so long as he holds the office, though disabled by disease from performing its duties. If it be an office held at the will of the appointing power, the appointing power may remove for disability, but cannot, in the absence of express law or regulation, stop the compensation while the office continues to be held."

In the case of the United States against Williamson, 23 Wall., 411, it was decided, that the regulation of the compensation of an officer belongs to the Legislative Department.

In the case of Ware against the United States, 7 C. Cls., 565, it was held that an officer furnishing a physi-

cian's certificate of illness explaining absence from duty is entitled to his full compensation, and that no part thereof can be arbitrarily withheld from him.

Appellant's case, as to his first cause of action, is on all fours with Ware's case.

Appellant is unquestionably entitled to this $35.30 embraced in his first cause of action.

2. Having been illegally relieved of his duties as such clerk July 31, 1894, is he not legally entitled to his compensation from said last named date in the sum of $3,417, as prayed in the amended petition at page 13 of the record?

In the case of Williamson 23 Wallace, already referred to, it was held that Williamson, although at his home "awaiting orders," was entitled to the salary of the office of captain of a company of the 6th Regiment Infantry, notwithstanding he, during the time, performed no military service whatever. The fact was that he legally held the office, the pay of which he was justly entitled.

In the case of Harrold, 23 Court of Claims, 295, it was held that Harrold was justly entitled to the pay of an officer of the Army, assigned to duty which required him to be mounted, from the date of such requirement, rather than from the date when his command was actually mounted. and whether his battery was fully equipped or not.

In Sleigh's case, 9 C. Cls., 369, heretofore cited, it was decided that the incumbent of an office is *prima facie* entitled to the lawful compensation thereof so long as he holds the office."

If Appellant has been unlawfully dismissed, he is legally in office; and, *being in office*, he is *prima facie* entitled to the pay of that office. He has stood ready and

willing to discharge its duties, and has therefore done all that he could do in pursuance of his duties.

In this connection, the Court is respectfully referred to

Mecham on Public Officers;
Throop on Public Officers, Sec. 473 to 500;
Emmett *vs.* Mayor, 38 N. Y. St. R., 907;
People *vs.* Mayor, 25 Wend. (N. Y.) 680.

It is, therefore, respectfully submitted that Appellant's case is well founded in law, and that the decision of the Court of Claims be reversed, with directions to enter up a judgment in favor of Appellant in the total sum herein claimed.

JOHN C. CHANEY,
For Appellant.